IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. DANIEL McMAHON DICKERSON, Defendant.	**No. 01-CR-4086** **ORDER**

I. INTRODUCTION

This matter is before the Court on the, "Report And Recommendation On Motion To Suppress" (Docket No. 29) issued by the Magistrate Judge. This relates to evidence seized from Daniel McMahon Dickerson at the time of his arrest and thereafter on August 2, 2001.

In the Magistrate Judge's analysis, beginning on page 10 of his Report and Recommendation, he finds that the encounter in question here was not a "traffic stop" concluding that Dickerson had already voluntarily stopped and parked his vehicle and had existed the vehicle by the time the officers interacted with him. The Magistrate Judge further concluded that the officers' observance of Dickerson making an improper turn was enough to allow Officer Queen to at least ask Dickerson a few questions, citing, Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L. Ed. 2d

889 (1968). The Magistrate Judge's analysis goes on to say that once Dickerson had said that he had consumed a couple of beers, the officers were justified in conducting field sobriety tests to determine whether there was probable cause to arrest Dickerson for driving while intoxicated, citing, State v. Stevens, 394 N.W.2d 388, 391 (Iowa 1986); and, United States v. Allegree, 175 F.3d 648, 650 (8th Cir. 1999). In the Stevens case, the Iowa Supreme Court held:

> To justify an investigatory stop, the officer must have reasonable cause to believe a crime may have occurred . . . The test of reasonable cause for an investigatory stop is not the officer's subjective theory, but whether "articulable objective facts were available to the officer to justify the stop." . . . If the State does not establish such facts, the evidence seized as a result of the stop must be suppressed.

State v. Stevens, 394 N.W.2d at 391.

In Stevens, the District Court had partially sustained a Motion to Suppress, but the Iowa Supreme Court reversed that ruling stating that the required probable cause needed before ordering a driver to preform sobriety tests had, under the circumstances of Stevens, been satisfied.

In Allegree, the Eighth Circuit Court of Appeals held that

following an initial, valid traffic stop to inspect the vehicles potentially improper headlights, a deputy sheriff's further fifteen minute detention and questioning of the defendant was reasonable. These cases were cited by the Magistrate Judge to show that in Iowa and in the Eighth Circuit, there is law that would allow the town officer, Mr. Queen, to stop the defendant, as he walked away from his car, and to ask him a number of questions.

The Magistrate Judge stated, as mentioned, that he felt that this was a Terry stop. In the case of United States v. Donald H. Jones, 269 F.3d 919 (8th Cir. 2001), there is an extensive discussion of Terry stops as follows:

> The principles of *Terry* provide that once Trooper DeWitt lawfully stopped Jones he was entitled to conduct an investigation "reasonably related in scope to the circumstances which justified the interference in the first place." Terry, 392 U.S. at 20, 88 S.Ct. 1868. . . "The scope of the detention must be carefully tailored to its underlying justification." Royer, 460 U.S. at 500, 103 S.Ct. 1319. This means that the Fourth Amendment intrusion "must be temporary and last no longer than is necessary to effectuate the purpose of the stop" and that the officer should employ the least intrusive means available to dispel the officer's suspicion in a timely fashion. Id. Consistent with

> these principles, our case law teaches us that a police officer, incident to investigating a lawful traffic stop, may request the driver's license and registration, request that the driver step out of the vehicle, request that the driver wait in the patrol car, conduct computer inquiries to determine the validity of the license and registration, conduct computer searches to investigate the driver's criminal history and to determine if the driver has outstanding warrants, and make inquiries as to the motorist's destination and purpose. See, e.g., United States v. Beck, 140 F.3d 1129, 1134 (8th Cir.1998) (concluding that checking validity of license and administering criminal history check on computer was not unreasonable procedure in traffic stop). . . After Trooper DeWitt had completed this initial investigation and determined that Jones was neither tired nor intoxicated, that his license and registration were valid, and that there were no outstanding warrants for his arrest, then the legitimate investigative purposes of the traffic stop were completed. See, e.g., White, 81 F.3d at 778 (stating that upon return of documentation and explanation of warning citation the traffic stop ends); United States v. Bloomfield, 40 F.3d 910, 916 (8th Cir.1994) (stating that reasonable scope of the initial traffic stop extends to the moment after the return of documents when officer asked if he could search the vehicle), cert. denied, 514 U.S. 1113, 115 S.Ct. 1970, 131 L.Ed.2d 859 (1995).

US v. Jones, 269 F.3d at 70.

This Court is aware that the defendant has argued that the

officers had no right to stop him; however, in this ruling, the Court is finding that the officers had a right to stop the defendant and question him and give him sobriety tests because of his early admission that he had "two beers." This amounted to articulable objective facts to justify the stop and the sobriety testing. State v. Stevens 394 N.W.2d at 391.

There is a statement by the Magistrate Judge on page 11 of the February 14, 2002 Report and Recommendation which states as follows:

> Thus, Dickerson's motion boils down to whether Officer Queen had a right to arrest Dickerson as a result of the field sobriety tests. If so, then the evidence obtained incident and subsequent to the arrest was obtained properly. If not, then everything flowing from the arrest must be excluded.
>
> In determining whether probable cause exists to make a warrantless arrest, the court looks to the totality of the circumstances to see whether a prudent person would believe the individual had committed or was committing a crime. *United States v. Segars*, 31 F.3d 655, 659 (8th Cir. 1994).

The first paragraph above is the key to the issue now before this Court.

In his Report and Recommendation, the Magistrate Judge summarizes the pros and cons of the testimony relating to

sobriety tests on pages 6-8. The defendant in his Supplement to Objections (Docket No. 53), uses eight pages of that document to show that in his opinion, the evidence is very strong showing that the Magistrate Judge's conclusion as to intoxication is erroneous. There is little unanimity as between the facts as set out by the Magistrate Judge and the objections to those facts by the defendant. The defendant set out some five or six pages of matters that pertain to those sobriety tests and whether or not the defendant was intoxicated. The defendant argues that the Magistrate Judge's Report and Recommendation did not consider numerous factual issues favorable to the defendant.

This Court has carefully looked over all of these objections and is persuaded that there was, despite the Magistrate Judge not commenting on several things, a clear enough issue to permit the defendant to be temporarily stopped to effectuate the purpose of the stop, i.e. to see if he was intoxicated.

The Court is persuaded that the Magistrate Judge's statement of the key issue, as set out on page 5 of this Order, is accurate and appropriate. This Court will now review some of the statements in the Report and Recommendation that deal directly with the sobriety tests.

II. REPORT AND RECOMMENDATION

First, on page 6 of the Report and Recommendation, the Magistrate Judge sets out that Officer Queen told Dickerson he was going to wait for the state troopers to arrive at the scene before administering the tests. This obviously demonstrates that Officer Queen knew of his own inexperience and wanted input and support from them as to administering the sobriety tests. He did not get it. It took the two state troopers at least seventeen minutes to arrive at Newell, and Officer Queen said that he had Dickerson wait in front of Queen's vehicle, standing with his legs slightly apart and his hands on top of his head and that Dickerson continued to be compliant with all instructions Queen gave him. Dickerson did ask questions about why he was being detained, whether or not he was under arrest, and if he could leave the scene. Officer Queen told Dickerson he was not free to leave the scene until after they had completed the sobriety tests.

The Magistrate Judge's Report and Recommendation sets out that Queen had Dickerson perform four different sobriety tests and that although the state troopers vehicles had video cameras, neither of their vehicles were parked in such a way that the

cameras could record the sobriety tests.

The transcript of the suppression hearing goes on for one-hundred forty pages, largely setting out what the five officers on the scene had to say about the sobriety tests. The objections to the Report and Recommendation and the response thereto is a maze of claims and counterclaims. The Magistrate Judge did not have a transcript of the testimony before him. Fortunately, this Court did. Even with a transcript, the claims and responses are still difficult to analyze. For that reason, this Court will set out the various "sobriety opinions" in graph form.

It should be kept in mind, when considering these sobriety test opinions, that Dickerson was no "ordinary" defendant. The state troopers, Beckman and Hesnard, had immediately, after they heard of the situation on the police radio, connected Dickerson to the Storm Lake Police Department bulletin, Exhibit 1 in this case. That bulletin had a picture of Dickerson setting out in part, that he was a bad man, who had done federal prison time and that he may well be armed and extremely dangerous.[1] Trooper

[1] For more particulars see pages 40-41 of this Order.

Beckman had alerted Officer Queen to this information which Officer Queen said he already knew.

DICKERSON GRAPH 1

TEST 1	QUEEN	BECKMAN	WESTERGAARD	CHRISTIANSEN	HESNARD
HGN Test	Poor motor coordination of eyes. Tr. 66. Lack of smooth pursuit by the eyes. Tr. 67. They (other officers) wouldn't be able to see this test. Tr. 68. He didn't pass. Tr. 69. Queen erroneously concludes you can test for drugs by a HGN Test. TR. 54-55 Defense witness says this is not possible. Tr. 117.	I couldn't observe the results of this test. Tr. 97.	I couldn't observe the results. I wasn't tall enough. Tr. 78.	I didn't see the results. Tr. 91. I was behind him (defendant). Tr. 91.	I didn't observe the field sobriety tests. Tr. 108, 112

DICKERSON GRAPH 2

TEST 2	QUEEN	BECKMAN	WESTERGAARD	CHRISTIANSEN	HESNARD
Walk & Turn	He used his arms to balance. His arms swayed. Tr. 57. He missed his heel and toe twice. Tr. 59. Defendant failed. Tr. 59. This test is even difficult if you are sober. Tr. 60.	Beckman says defendant failed this test. Tr. 98. (Remember however Westergaard said Christianson didn't see this because he was talking to the troopers. Tr. 79.	He(defendant) did reasonably well. He wavered a little. He didn't execute the turn as instructed. He didn't pass. Tr. 79.	I didn't see it. I was talking to Trooper Beckman. Tr. 91.	I didn't observe the field sobriety tests. Tr. 108, 112

DICKERSON GRAPH 3

TEST 3	QUEEN	BECKMAN	WESTERGAARD	CHRISTIANSEN	HESNARD
One Leg Stand	He put his foot down after counting to 1,011. I asked him to do it again - he put his foot up and counted to 1,018 - when I asked him to put his foot down. I decided the defendant didn't pass the test. Tr. 62-63.	Defendant failed this test. Tr. 98. Remember however Westergaard said Christianson didn't see this because he was talking to the troopers. Tr. 79. How could Beckman see these tests if he was talking to Christianson? When asked, Beckman didn't deny talking to Christiansen during tests 2 & 3. He said I can't remember. Tr. 104. In his investigation report, Ex. 1001, Tab 2, Beckman said "I did not observe the test completely."	He wavered a little bit - he put his foot down - I've seen people do much worse. Tr. 87. He didn't pass. Tr. 79, Tr. 89.	I saw it. In my opinion he didn't pass it. He put his other foot down and brought it back up again. He started wavering. Tr. 91. I <u>think</u> that he didn't pass this test. Tr. 92.	I didn't observe the field sobriety tests. Tr. 108, 112.

DICKERSON GRAPH 4

TEST 4	QUEEN	BECKMAN	WESTERGAARD	CHRISTIANSEN	HESNARD
Breathalyzer (alcohol in breath)	Test was .001 Tr. 22 Sober as to alcohol in breath. Tr. 22.	Test was .001 Tr. 22 Sober as to alcohol breath. Tr. 22.	Test was .001 Tr. 22 Sober as to alcohol breath. Tr. 22.	Test was .001 Tr. 22. Sober as to alcohol breath. Tr. 22.	Hesnard administered Breath Test. Tr. 21, Tr. 113. Test was .001 Tr. 22 Sober as to alcohol in breath. Tr. 22.

DICKERSON GRAPH 5

OTHER	QUEEN	BECKMAN	WESTERGAARD	CHRISTIANSEN	HESNARD

Other Observations	I consulted with the troopers, thought he was perhaps high on another drug. I arrested him. Tr. 22. Dickerson had no trouble moving about. Tr. 50. Dickerson had no trouble talking. Tr. 50. Dickerson never had any trouble with hands over his head for many minutes. Tr. 53. I didn't know the troopers cars had video tapes. Tr. 64.	We did all agreed defendant had failed the tests and that he should be arrested for OWI. Tr. 99. Christianson only saw the one leg stand test. He could not agree as Beckman claims. Tr. 91-92. Trooper Hesnard said he had not seen the sobriety tests, Tr. 108, 112, and that he had no such conversation as to "all agreeing." Tr. 113. Hesnard further said: to arrest him was not my determination. There was just Queen and I talking and Queen decided it. Tr. 113. What were the lighting conditions for the HGN test? It was dark out. It was five to one in the morning. As far as the quantity of the light I can't really tell you. You could make out buildings. Tr. 96-97 Contra: the lighting was there, you could see a person's eyes. Some officers may need a flashlight in a situation like that. But there was enough light for HGN test. Tr. 104. I got close to the defendant <u>after</u> the sobriety tests. I detected no slurred speech or faulty motor skills or any balance problems or any watery eyes or bloodshot eyes. Tr. 105. Beckman, at the supplemental hearing, stated that "9 out of 10 times I would have used a flashlight."	Westergaard says Christianson didn't see the sobriety test - he was talking to the Troopers. Tr. 79. Q. How could the trooper Beckman watch if he was talking to Christianson? Trooper Hesnard said he wasn't watching. Tr. 108, 112. His speech was slow and whiney. Tr. 84. He was fairly compliant. Tr. 86.	"I heard traffic on the scanner..." They used the code, "...ten two hundred [drug involved] and then also use extreme caution." "...so I drove in to town [Newell]. Tr. 90.	I smelled no odor of alcohol Tr. 112. Officer Queen was the person who determined that an arrest was going to be made. Tr. 108. Hesnard further said, to arrest him was not my determination. There was just Queen and I talking. I had no such conversation as to "all agreeing" and Queen decided it. Tr. 113. I was very close to the defendant when I gave the Breathalyzer test. I saw nothing to indicate he was under the influence of either alcohol or a controlled substance. Tr. 114.

As mentioned, this Court felt that the preceding graph would aid in finding out exactly what positions these officers had taken in relation to the "sobriety tests."

1. Test Number One - Horizontal Gaze Nystagmus

In test number one, which is the Horizontal Gaze Nystagmus test (HGN), Officer Queen was testing the defendant, Dickerson, in an effort to show intoxication by alcohol. Officer Queen proceeded to attempt this test before they did test number four, which is the Breathalyzer test for percentage of alcohol in the breath. When Officer Queen was conducting test number one, he, of course, was trying to show that the defendant was intoxicated by alcohol. The Court has no doubt that this test is helpful to the law enforcement officers when they are trying to establish intoxication by alcohol. However, had the Breathalyzer test been given first, clearly showing that Dickerson was not intoxicated by alcohol, there would have been no reason to give the HGN test. If there was no alcohol in Dickerson's breath, there could be no alcohol in his system to make his eyes react during the HGN test to show he was intoxicated by alcohol. As to the HGN test, Queen testified that the defendant had poor motor coordination in his eyes and that there was a lack of

"smooth pursuit" by his eyes as the officer proceeded through the test. The alcohol affects the eyes in certain ways, i.e. makes them bloodshot and watery. Drugs, such as the methamphetamine which was found on the defendant, do not affect the eyes in the same way. Officer Queen, who is a first year law enforcement officer, erroneously concluded that you can also test for other drugs that stimulate the central nervous system by using the HGN test. This conclusion was clearly refuted by Jay Garroutte's testimony, presented by the defendant. (Tr. 117).

Mr. Garroutte, who is now an investigator for the Federal Public Defender in Iowa, has close to twenty years experience in law enforcement. He has had extensive experience with the HGN test (Tr. 118-20). He testified that the HGN test was designed to see whether or not the eyeball can actually remain in the corner of the eye without twitching back and forth. (Tr. 119). The HGN test is not designed to test the movement of the subject's eyes while following an item such as a finger or a pen, nor does the HGN test "give you a halfway decent accurate reading on how much alcohol the person has been drinking", as Officer Queen said. (Tr. 18). Officer Queen was giving the HGN

test looking for conditions that you can not determine by the test. Because the other four officers on the scene flatly say, "I didn't observe the HGN results," they provide no support for Officer Queen's conclusion as to the first test. There is considerable evidence to show that it was dark at the scene and while Trooper Beckman said that he felt there was enough light to give the HGN test, he also said that in nine out of ten cases at night, he would have used a flashlight to see Dickerson's eyes. There is no evidence that Officer Queen used a flashlight. Officer Queen either did not have a flashlight or did not know that it was acceptable procedure, by seasoned law enforcement officers, to use one. The bottom line is that Queen's conclusions as to test number one, the HGN test, as used here, i.e. that it showed Dickerson was intoxicated by "some unknown" drug, is worthless. It showed nothing to prove alcohol intoxication, and it is not an acceptable test to reveal the presence of drugs in the body. The HGN test ends up as a zero bit of evidence which does not help at all towards the prosecution's duty to carry the burden of proof as to intoxication because of drugs.

2. Test Number Two - Walk And Turn

As the graph shows, the next test, test number two, was the walk and turn test. Officer Queen said that he watched Dickerson and that Dickerson inappropriately used his arms to balance himself and that his arms swayed as he was proceeding. Further, he stated that Dickerson missed the heel and toe placement position twice and that in Queen's opinion, Dickerson failed test number two, the walk and turn test. (Tr. 57, 59, 60). On the graph, Trooper Beckman is the next one to speak of test number two. He says that the defendant failed this test. (Tr. 98). However, Newell Officer Westergaard testified that Deputy Sheriff Christiansen told him that he did not see the walk and turn test because he was talking to state troopers Beckman and Hesnard. The testimony of one of the government's own witnesses showing the "unavailability" of Trooper Beckman to actually see test number two, the walk and turn test, make Beckman's opinion questionable.

As Graph 2, p. 9 of this Order shows, Newell Officer Westergaard said that Dickerson did reasonably well on the walk and turn test, test number two. He said that Dickerson wavered a little; that he did not execute the turn as he had been instructed, and that he did not pass the test. (Tr. 79). As

the graph shows, Officer Christiansen flatly said, “I didn’t see [test number two]. I was talking to Trooper Beckman.” (Tr. 91). As the graph shows, Trooper Hesnard said, “I didn’t observe the field sobriety tests.” (Tr. 108, 112). Officer Queen said that the defendant failed the test. However, right after making that conclusion, he said the walk and turn test is a difficult test to do even if you are sober. (Tr. 60).

So, in retrospect, we have Officer Queen saying the defendant did not pass, but adding that the test is difficult to do even if you are sober. Trooper Beckman is also saying, the defendant failed, but Trooper Beckman was not really watching if he was talking with Deputy Sheriff Christiansen. As to test number two, Officer Westergaard felt that the defendant did not pass, even though Dickerson did “reasonably well.” This is hardly persuasive evidence to assure that the burden of proof was met. It would have been easy to cement in what really happened if the record included an audio-video tape.

3. Test Number Three - One Leg Stand

The next test, test number three, is the One Leg Stand test as Graph 3, on page 10 of this Order, Officer Queen said, “I told him to put his foot up and count to one-thousand thirty.

The first time he put his foot down after reaching one-thousand eleven." (Tr. 62). Queen said that he asked him to do it again, and the defendant responded and performed the test up to one-thousand eighteen and was still going when Queen told him to put his foot down. Dickerson had not yet had a chance to get to one-thousand thirty, but Queen made the conclusion at that moment that the defendant did not pass the test. As to test number three, the one leg stand, Trooper Beckman said that the defendant failed the test. In his investigation report (Exhibit 1001, Tab 2) Beckman says, "I did not observe the test completely." When asked directly, Trooper Beckman did not deny talking to Deputy Sheriff Christiansen during tests two and three. He said, "I can't remember [if I was talking to him]." (Tr. 104).

As the graph shows, Officer Westergaard said that on the one leg stand test, the defendant wavered a little bit, put his foot down. Then he concluded by saying, "I have seen people do much worse." But he also added, "The defendant here didn't pass." (Tr. 79, 87, 89).

Deputy Sheriff Christiansen said as to test three, "I saw it. In my opinion he didn't pass. He put his other foot down

and brought it back up again. He started wavering. I think he didn't pass that test." (Tr. 91, 92).

So we have Queen and Westergaard and Christiansen saying that the defendant did not pass test number three, the one leg stand. We have Officer Beckman saying that he did not see the test completely, and Trooper Hesnard saying he did not see it at all.

4. Test Number Four - Breathalyzer

Test number four was a Breathalyzer test for determining the amount of alcohol in the breath which is used by officers on a regular basis and is considered to be an accurate, preliminary test. Defendant Dickerson tested .001, the same as zero, i.e. no alcohol in the breath. Officer Westergaard, Trooper Beckman, Deputy Sheriff Christiansen and Trooper Hesnard all would have to agree that the defendant passed this test. He was not intoxicated by alcohol. As further stated by Trooper Beckman, "I detected no slurred speech or faulty motor skills or any balance problems or any watery or bloodshot eyes in the defendant." (Tr. 105). As to the overall tests, Officer Queen said, "I consulted with the Troopers and we thought he was perhaps high on another drug and I arrested him." Trooper

Hesnard flatly denies he made this observation and/or comment. Queen also testified that Dickerson had no trouble moving about (Tr. 50); he had no trouble talking (Tr. 50); he never had any trouble with balance, even with his hands over his head for many minutes. (Tr. 53).

Officer Beckman made a statement that the Magistrate Judge used in his conclusions, "We **all** **agreed** that the defendant had failed the tests." (Tr. 99)(emphasis added). This statement of Trooper Beckman's is, of course, far from deadly accurate because Deputy Sheriff Christiansen saw only one test, the one leg stand test, and he certainly did not agree that the defendant failed all the tests. Trooper Hesnard said he had no such conversations as to all officers agreeing. (Tr. 113). He did not give his comments to anybody because he said he did not see anything. (Tr. 113). Officer Westergaard says, "The defendant's speech was slow and whiney. He was fairly compliant." (Tr. 84, 86). Officer Hesnard who was close to the defendant when he gave him the Breathalyzer test stated, "I was very close to the defendant when I gave the Breathalyzer test. I saw nothing to indicate he was under the influence of either alcohol or a controlled substance." (Tr. 114). He certainly

torpedoes the opinions of the other officers who said to the contrary.

III. SUMMARY OF GRAPHS

As the Graphs show, there were four sobriety tests given. The HGN test, the walk and turn test, and one leg stand test and the Breathalyzer test.

As set out on pages 13-15 of this Order, the HGN test did not prove anything. The Breathalyzer test showed no alcohol in the breath, so it is uncontroverted that Dickerson was not intoxicated by alcohol. None of these officers wanted to challenge the accuracy of the Breathalyzer test. They rely on it hundreds of times a year.

Therefore, we have only two tests that are in controversy, the walk and turn test and the one leg stand test. We can not use any conclusions from Trooper Hesnard because he flatly says, “I didn’t see any of the tests.”

Test number two is discussed on pages 15-17 and briefly summarized on page 17 as follows:

> We have Officer Queen saying the defendant did not pass, but adding that the test is difficult to do even if you are sober. Trooper Beckman is also saying the defendant failed, but Trooper Beckman was not really

> watching as he was talking with Deputy Sheriff Christiansen. As to test number two, Officer Westergaard felt that the defendant did not pass, even though Dickerson did "reasonably well."

And, Deputy Christiansen testified, "I didn't see test two."

As to test two this would leave us two "failed to pass" conclusions by Officer Queen and Officer Westergaard. One "iffy" (unquestionable) failed to pass" conclusion by Beckman, and one "I didn't see it", by Deputy Christiansen.

Test three is discussed on pages 17-19 and briefly summarized on page 19 as follows:

> So we have Queen and Westergaard and Christiansen saying that the defendant did not pass test number three, the one leg stand. We have Officer Beckman saying that he did not see the test completely, and Trooper Hesnard saying he did not see it at all.

As to test three, this would leave us three "failed to pass" conclusions made by Officers Queen, Westergaard and Christiansen, and one "iffy" (questionable) conclusion made by Beckman.

If you add together the four conclusions as to test two and the four conclusion as to test three, you have eight conclusions.

Out of these eight conclusions, we have five “failed to pass” conclusions; two “iffy” (questionable) conclusions; and, one, “I did not see”, conclusion.

These totals show that a solid majority of the officers concluded Dickerson was intoxicated. They further decided he was intoxicated by something other than alcohol. However, such a conclusion, i.e. that Dickerson was intoxicated by something other than alcohol, ignores what Troopers Beckman and Hesnard say, as shown in Graph 5, on page 12 of this Order. Hesnard stated, “I saw nothing to indicate that he was under the influence of either alcohol or a controlled substance. (Hesnard, Tr. 114). Further, Beckman stated, “I got close to the defendant after the sobriety tests. I detected no slurred speech or faulty motor skills or any balance problems or any watery eyes or bloodshot eyes. (Tr. 105).

As mentioned, that conclusion, i.e. that the burden of proof has been met also ignores the fact that tests two and three are really tests for alcohol intoxication and there is nothing in this record to show that these two tests, alone, and that is all the prosecution has, were ever found to be sufficient evidence to show that a person who failed them was intoxicated by

something other than alcohol.

IV. VIDEO EQUIPMENT

This brings us to the matter of the failing to use the audio-video equipment which could have given us a tape that would show a clear, concise view of what really happened, instead of the difficult to analyze collection of somewhat weak opinions the Court has before it to consider. The Court will now discuss that situation.

It should be remembered that the state troopers had two cars on the scene within a few feet of the spot where the sobriety tests were given. These cars are fully equipped with flood lights, and audio-video equipment which is easily, and often, used by these state troopers to tape and record conversations of those suspected of being under the influence of alcohol or drugs. The testimony before the Magistrate Judge is that neither of the troopers' cars were parked in a position where they could record the actual happenings of the sobriety tests. (Tr. 100). This has got to be almost a joke. The officers still had the keys to those cars and could have moved them on a moment's notice. If they decided not to move them, they could have certainly walked Dickerson over in front of one of those

cars and then turned on all of the paraphernalia they have to fully, carefully, and completely record the situation that was going on during the sobriety tests.

These state troopers are well trained. They know their job and have been involved in literally hundreds of such incidents. They are well aware that the best record to make of what took place, i. e., whether somebody's toe did not follow somebody's heel, is right in their car with the video tape.

V. OFFICER QUEEN

As to Officer Queen's competence and credibility, defendant's Exhibit "E" is a record of a meeting of a special session of the Newell City Council, September 20, 2001, which was forty-seven days after Dickerson's arrest. The purpose of the meeting was to ask the City Council to reverse Officer Queen's, "hearing of termination results." Queen had received a letter from Police Chief Roger Hakeman which outlined the reasons for his firing Queen. They were:

> (1) Queen's failure to exercise good judgment; particularly, he repeatedly failed to use good judgment in connection with when he should have sought assistance.
>
> This is a key attribute of a quality peace officer in a small community. The police

> chief's letter said that the problem rather than abating, actually grew worse as time went by.
>
> (2) Queen's failure to complete his assignments in a timely and professional manner.

Queen had particular problems in this area when the assignments involved paper work. The police chief's letter went on to say:

> (3) Queen's failure to demonstrate knowledge of state and federal laws, city ordinances, and case law as they relate to his assignment. Most seriously, but not limited to failure to grasp the legal requirements of a lawful stop, search, and/or seizure.

This last sentence certainly casts direct doubt on Queen's competence and credibility to the precise issues before this Court, a lawful stop, search, and seizure. Queen's lack of competency and credibility is clearly set out in the testimony of the governments "star" witness Trooper Beckman. When asked by the Court why Trooper Beckman and Hesnard took over from Officer Queen, Trooper Beckman stated, "Queen didn't know what needed to be done. (See Beckman's full opinion of Officer Queen's severe limitations as set out on pages 30-31 of this Order).

VI. ACTIVITIES AFTER THE ARREST

It should be noted that at the moment that Officer Queen stated, “You are under arrest,” and then put handcuffs on Dickerson, things happened. These quiet, almost non-participating state troopers changed their pace completely when the sobriety tests were completed.

A synopsis of events is that Officer Queen explained to Dickerson that he was under arrest for operating while intoxicated (OWI). Handcuffs were put on the defendant. In Beckman’s report, Exhibit 1001, it states that Trooper Hesnard immediately began to search Mr. Dickerson. In Dickerson’s front, right, jean watch pocket, Hesnard found a clear, small plastic bag with a white powdery substance in it. Trooper Hesnard then handed that bag to Trooper Beckman. Beckman says that during the search of the defendant, he [Beckman] observed Trooper Hesnard remove from the defendant’s right stocking another clear, plastic bag. This bag was considerably larger and contained multiple rock forms and powder forms of a white substance. When all of the baggies were taken off of the person of Dickerson, Trooper Hesnard took possession of the baggies.

Trooper Beckman then contacted the Buena Vista County

Community Center and requested that a canine dog be sent to the area. This was immediately done. Trooper Beckman knew what to do and when to do it. When the dog arrived, Beckman says that he watched Officer Baudine and his dog conduct the search of the defendant's car. Officer Baudine found that Dickerson had a black digital scale and an address book which had the names and dollar amounts and weights of what was owed to the owner of the book. There was also an atlas there with several roads highlighted from Iowa, Minnesota, and Wisconsin. These objects were all seized by Trooper Beckman. After the inventory of the car was completed, Trooper Beckman saw that Cross-Towing of Storm Lake was given the car for confiscation. Beckman then went to the Buena Vista County Jail, to meet with Officer Queen and Trooper Hesnard, who had taken Dickerson to that jail. At the jail, Trooper Beckman says, "We made contact with Assistant Buena Vista County Attorney Kimble. We explained to Kimble that we had Dickerson in custody for OWI, possession of a controlled substance (methamphetamine), possession of drug paraphernalia, and tax stamp violation. We also explained to Kimble that we would like to have his assistance in obtaining a search warrant for the residence of Dickerson due to him admitting 'being at

his residence earlier that night', and the other evidence we had obtained." (Exhibit 1001, Tab 2). Trooper Beckman goes on to say that during the preparation of the search warrant, "I made contact with the Buena Vista Sheriff's Officer, Deputy Simmons, and I asked him if he would have any personnel to assist in the search warrant. Trooper Hesnard explained to me that he had already contacted the Sac County Sheriff's Officer to assist."

Trooper Beckman says in his report, Exhibit 1001, Tab 2, that after the search warrant was completed:

> I left for the residence in Nemaha, [defendant's residence], and Trooper Hesnard and Officer Queen left to go to Newell to have Magistrate Gailey review the warrant and sign it. While I was in route to Nemaha, I requested that Trooper K. Knebal assist us. At eighteen fifteen hours, we entered the residence of Dickerson and Trooper Hesnard read the warrant. During the search of the residence, Trooper Beckman found several items that were seized as he and Trooper Knebal searched the home.

In Trooper Hesnard's affidavit of the search warrant, he says that, "I have experience as a trooper and have been involved with numerous drug investigations resulting in convictions. I have attended many training session concerning

drug investigations. Drug interdiction is one of my primary, everyday activities." Trooper Hesnard further states:

> I conducted the search of Dickerson's person incident to the arrest, and located a baggie containing an off-white powdery substance that was consistent with the appearance of methamphetamine. I located another plastic baggie in Dickerson's right sock. This baggie contained approximately four rocks of an off-white substance consistent in appearance with methamphetamine. I found $668.00 in cash on Dickerson's person.

Trooper Hesnard goes on to say that during the search of the vehicle, ". . . I was assisted by several officers . . . located a small black digital scale . . . notebooks or ledgers containing the names of people and amounts of cash. Also contained in one of the ledgers was a note about 'for lb-$9,600.00.'"

Trooper Hesnard states that on the spot, he tested a field sample of the large quantity of rocky substance from Dickerson's sock. It tested positive for methamphetamine. He said that he weighed the substance at the Buena Vista County Sheriff's office, and that "this was an amount that was more than what would be used for personal use. It was indicative of drug trafficking."

Trooper Hesnard further states, “I charged Dickerson with possession of methamphetamine with intent to deliver. Trooper Beckman charged Dickerson with drug-stamp violation.” It is obvious that these two well-educated, well-trained state troopers took over the instant that Dickerson was placed under arrest. They were in charge. When asked about that, Trooper Beckman answered as follows:

> Your Honor, as far as Trooper Hesnard and my role later after the actual stop took place, Officer Queen asked us if he would - - if we would assist him in getting a hold of the right people that needed to be contacted, and the reason for that was just because Mr. Queen wasn’t real familiar with that type of a situation, what to do next, what all needed to be done, who all needed to be called, what all we needed to do. And he more or less just asked us if we would sort of take the reigns.

(emphasis added).

Trooper Beckman used the words, “after the actual stop,” of course these sobriety tests took place after the actual stop, but Beckman’s statement is not accurate. The “taking over the reigns” should have started shortly after the Troopers arrived, when they saw Officer Queen stumbling through the HGN test, but it really did not start until Officer Queen said, “I arrest”.

Again it is obvious that they well should have used some of their precise training shortly after they arrived at the scene by advising Officer Queen such precise tips as, “We have audio-video capabilities”, “It is a good idea to make the first test the Breathalyzer”, “If the breath alcohol reading isn’t high enough to show intoxication by alcohol, then the audio-visual becomes all the more important to make a case stand up when we are trying to show intoxication by drugs” and “We use a flashlight to perform the HGN test when the light is bad.” Had they given this kind of advice at about the time the sobriety tests began, they would not have to now rely on Officer Queen to try and make a good case. Queen, who was a new police officer in his first year, had much to learn, as stated by Trooper Beckman, on pages 30-31 of this Order and further shown by Queen’s acts and/or omissions.

This Court cannot believe that the reasons that the troopers’ video tape equipment was not turned on prior to the time of the sobriety tests was because these patrol cars were not pointed in the right direction and/or that the state troopers just “forgot” to turn on the equipment. Trooper Beckman had told Officer Queen the instant that he first had him

on the radio, ". . . use extreme caution. You have a possible ten-two hundred (10-200) (that [the defendant] may have drugs) (Tr. 11), I am coming over there." (Tr. 13). Was Dickerson going to be arrested whether he was intoxicated or not? The Court hopes not. However, it is a much more irrefutable approach to insure a successful prosecution for the other officers to support Officer Queen's "iffy" conclusions that Dickerson was in fact intoxicated by something other than alcohol, than to have a clear, graphic audio-visual tape for the trier of fact to consider. A tape may not convey the same picture that Officer Queen and some of the others presented by their oral testimony.

Methamphetamine was found on Dickerson. If Dickerson was not intoxicated because of alcohol, and everybody agrees that he was not[2], then, if he was intoxicated, it had to be some type of drug. It certainly cannot be assumed that although he had methamphetamine in his pocket and his sock, he was actually taking some other drug. This Court, after ten years of sitting on drug cases, takes judicial notice that if Dickerson was

[2] Breathalyzer test result was .001.

taking methamphetamine, it would not make him act in the same way as alcohol. It is very possible that methamphetamine, had it been taken that day, would have heightened his physical and mental performance; that he would not make the same physical and mental mistakes that he would if his body and mind were under the influence of alcohol.

VII. SUPPLEMENTAL HEARING

After the Report and Recommendation was filed by the Magistrate Judge, this Court held a supplemental hearing in this matter.

At the beginning of the hearing, the Court stated that it needed to hear more from the state trooper witnesses. The Court acknowledged that the Magistrate Judge, as always, had done a fine job and had spent three to four pages of his Report and Recommendation setting out why he had decided there was enough evidence to allow the sobriety tests to be given and to find the government had met its burden as to a finding of intoxication. As earlier mentioned, the defendant, after the Report and Recommendation, had filed six or eight pages of detailed objections arguing that the Magistrate Judge had not considered many matters. This Court is well aware that every opinion that

is written does not and should not have to cover every possible nuance, but the Court felt that the twenty opinions as to the outcome of the sobriety tests, given by the five officers, some weak, some inconsistent, and some less than credible, required that this Court look into the totality of the circumstances as contemplated by U.S. v. Segars, discussed on page 5 of this Order.

The first witness called was Trooper Phillip Hesnard. He said that he heard the chatter on the radio, that he was not asked to go to Newell, but that he recognized that the person Queen had stopped was the individual described in the Storm Lake Police Department Officer's Bulletin, Exhibit 1, and that he could be carrying weapons and could be combative. (Tr. 107). He went to offer his assistance. He got there shortly after Trooper Beckman had arrived and parked right next to Beckman's car. The evidence is that both state troopers' cars were within a few feet of where the sobriety tests were eventually given and those cars were easily available to record the tests. Trooper Hesnard admitted that his car had audio-visual recording equipment, that it was good equipment, that it enables troopers to accurately document traffic in criminal cases and video tape

them, and that the equipment has been invaluable in court proceedings and traffic collisions. He also said that he understood that in addition to assisting troopers and catching violations of the law, the recording equipment has also cleared many troopers from false accusations. He said that he had sufficient training in the use of this equipment and that he knew how to operate all of it. When asked point blank why either his car or Trooper Beckman's car had not been used to accurately document what had happened, he flatly answered, "I don't know Sir." He added that it was not very often that he did not use it. He just did not have any reason why it was not used.

Trooper Hesnard stated that he did not know that Newell Officer Queen was not aware that the Troopers' cars had audio-visual capability. He acknowledged that he had not told Officer Queen about this fine equipment. Trooper Hesnard said that he did not hear Officer Queen ask the defendant to move to the front of Queen's vehicle where there was more light. Trooper Hesnard admitted that his audio-visual equipment was not on at any time that night. When asked about Trooper Beckman's statement that it was dark out at 12:55 a.m., but that it was

light enough that you could see across the street and could make out buildings, Trooper Hesnard agreed that that was an accurate appraisal of the lighting conditions then present.

Trooper Hesnard acknowledged that the reason for the audio-video equipment is to capture on tape what takes place in front of you. Trooper Hesnard further acknowledged that he knew that Colonel Robert O'Gerrison was the Chief of the Iowa State Patrol, and that he had no quarrel with the Colonel's statement that each state trooper's patrol vehicle is equipped with audio-visual recording equipment which enables the troopers to accurately document evidence in criminal cases and that this equipment has proved to be invaluable in court proceedings and traffic collisions.

Trooper Hesnard further acknowledged that his car could have been easily moved and put in a place where Dickerson could have been audio-video tape recorded and that if there was not an appropriate place nearby that Dickerson could easily be moved to an appropriate place. Trooper Hesnard acknowledged that he had moved other suspects at other times so that they would be in front of his audio-visual equipment. He said that he has a "body mike" that he carries on him which will turn on this

audio-video tape. The video camera then kicks on or he can also go to the car and turn it on. He said that he no reason to believe that the video equipment was not working properly that day. He was then asked if he had been invited to come and help Officer Queen at Newell in the Dickerson matter. He said, “Oh no, I came definitely on my own.”

The second witness was Trooper Brian Beckman. He acknowledged that he was in Newell that night and that he was driving a state trooper car and that his car was also fully equipped with an audio-video camera recorder and there wasn’t anything wrong with that equipment. Trooper Beckman also acknowledged what Colonel Robert O’Gerrison has said about this fine equipment, and he was then asked if he agreed with Colonel Garrison about this equipment. He said, “Yes”, he certainly did. He was then asked, why it was not used. “I just didn’t turn it on, your Honor.” He was asked point blank if he agreed that this equipment enables troopers to accurately document evidence in criminal cases. He said that that was true and that he used it almost daily.

Trooper Beckman was asked if he was aware that Officer Queen had told the defendant to move to the front of Queen’s vehicle

where there was more light. Trooper Beckman said that he did not have any reason to believe that had not happened. Trooper Beckman acknowledged that he had never told Officer Queen that night that his car had audio-visual taping capability. He further acknowledged that he had testified before the Magistrate Judge (Tr. 97) that on the night that the sobriety tests were being given that it was dark out, that it was 12:55 a.m. and that he acknowledged that you could see a person across the street in the street lighting. He further said that when Officer Queen was giving the "HGN" test that there was enough light to see the defendant's eyes but that in a situation like that, "if I need more light, I will use my flashlight."

Trooper Beckman acknowledged that Officer Queen had stated that he had waited until the state troopers got to Newell to start giving the sobriety tests. He said that when he first arrived in Newell, his focus was on the concern of the safety of Officer Queen and his reserve officer, and therefore, he jumped out of his vehicle and assessed the situation. He further acknowledged that Trooper Hesnard arrived very shortly thereafter. He was asked if it was true that they found defendant Dickerson standing with his feet apart and his hands

on top of his head causing no safety problems. Beckman agreed that this was the situation just after he arrived at the scene and that, counting himself, there were five officers present. Beckman was asked if this would have been a good time to record what was about to happen. Trooper Beckman answered by saying that after he got out of his car and had assessed the safety situation, that if he had wanted to turn on the audio-video equipment he could have clicked it on by a "remote" he had on him; he could have moved his car or had Dickerson get in front of his car. He acknowledged that this could have been done. Again, he was asked why he did not turn on the audio-video equipment and he said that he just forgot to do it.

The bottom line is that these state troopers knew exactly how to test a defendant and to search a defendant and just when they can do it. They knew exactly how to get a drug dog and how to let said dog and his attendant proceed. They knew exactly where the courthouse was, how to book a person, how to charge a person, exactly what to charge him with and exactly who to contact to obtain a search warrant, and exactly how to use that search warrant once they got it. They are well-trained professionals. They were well aware of the "Officer Safety"

bulletin, Exhibit 1, put out by the Storm Lake Police Investigations Division concerning Dickerson. They had immediately told Officer Queen about that bulletin. Trooper Beckman had also told Officer Queen, that this was a possible ten two hundred (10-200) case which in police jargon means, you do not have a traffic case you have a drug case. (Tr. 11). Officer Queen had stated that as soon as he saw Dickerson, he knew that he was the same person who was the subject of the "Officer Safety" bulletin. (Exhibit 1). They were all aware that the Storm Lake Police Department was sure Dickerson was selling methamphetamine, carrying the drugs in his socks, that he was a bad man with a long history of selling controlled substances, that he had done federal time in Arizona for selling and manufacturing methamphetamine, and that Dickerson was suspected of killing a police officer in Arizona. Further, that he should be considered extremely dangerous and armed.

When the state troopers headed for Newell, they certainly had the good intentions of backing up Officer Queen, making sure that he did not get overpowered and/or shot by Dickerson, making sure that everything went well so that when Dickerson was arrested, the procedures would support a conviction. However,

the “Officer Safety” bulletin (Exhibit 1), while it is certainly a caution to all officers and very important and should be well heeded, it is not a warrant. It does not say, “arrest him now, whatever the situation is.” When they found a mostly compliant Dickerson with no gun, and obviously not intoxicated by alcohol, would it not have been more appropriate to turn on the audio-visual equipment so that a reviewing judge would know just how the sobriety tests went? As mentioned, Officer Queen never knew the troopers had audio-video cars and the troopers never even told that to Queen. The “iffy”, weak testimony, as to sobriety, by alcohol or drugs, raises relevant credibility problems.

VIII. CREDIBILITY

As everyone is aware, the usual credibility issue in any case is to weigh the prosecution’s witness’ testimony as against the defense’s witness’ testimony. This case is based almost entirely upon sharply conflicting oral testimony of the prosecutor’s own witnesses. Since there is no audio-visual tape recording, this presents the Court with the job of weighing the conflicting testimony of five prosecution witnesses. The Court is well aware that the Graphs (pp. 9-12) show that all of the testimony is not conflicting.

One clear case of sharply conflicting oral testimony is Trooper Beckman's flat statement, "We all agreed defendant had failed the tests" and that "he should be arrested for OWI." (Tr. 99; Graph 4, p. 11).

Trooper Hesnard torpedoes this statement of Trooper Beckman's by testifying, "I didn't observe the field sobriety tests." (Tr. 108, 112; Graph 2, p. 9). Hesnard further testified, "I made no determination as to whether or not the defendant should be arrested, just Officer Queen and I were talking and Queen made that determination, (I was at no meeting of "all" officers where that was discussed). (Tr. 113; Graph 5, p. 12). He says further, "I saw nothing to indicate he was under the influence of either alcohol or a controlled substance." (Tr. 114; Graph 5, p. 12). Deputy Sheriff Christiansen said, "I didn't see the walk and turn test, I was talking to Trooper Beckman." (Tr. 91; Graph 2, p. 9). Trooper Beckman, the declarant of the conclusion that "we all agreed he failed the tests" (Tr. 99) gave the following answer when testifying in front of the Magistrate Judge:

> As far as the one leg stand test, that also resulted in a fail. From what I saw, due to count number one, he put his foot down. His

> arms were also being used to balance, and he had also raised his arm over his head, had obvious amount of swaying while conducting the test.

(Tr. 98).

Sounds like a strong statement, however, on that day, testifying before the Magistrate Judge, Beckman failed to add what he had written in his Iowa State Patrol Investigation Report (Exhibit 1001, Tab 2) six months earlier, "I did not see the test [one leg stand] completely."

The only test he might have completely seen was the walk and turn test, but remember Officer Christensen said, "I didn't see that test. I was talking to Trooper Beckman." (Tr. 91; Graph 2, p. 9). The support for Beckman's conclusion that, "We all agreed" is weak, contains conflicting evidence, and lacks credibility.

Another part of the sobriety tests that shows a lack of credibility as to Trooper Beckman's conclusion that "we all agreed the defendant failed the tests" is the HGN test. It has been shown that the HGN test cannot be used to determine intoxication by anything but alcohol. (See pages 13-15 of this Order). Officer Queen did not know this but the state troopers

either knew or should have known that the HGN test is worthless to determine intoxication by drugs. In their testimony, they did not contest the conclusion of the defendant's expert on this point.

IX. NO AUDIO-VISUAL TAPE

In United States v. Chatman, 119 F.3d 1335 (8th Cir. 1997), the Eighth Circuit said:

> [w]hile the district court was free to draw negative inferences from the absence of a videotape of the incident or copies of the traffic citations, it was not required to make such findings.

Chatman, 119 F.3d at 1340.

This Court, for all the reasons set forth in this Order has drawn negative inferences from the absence of the audio-visual tape. It is difficult to accept that these seasoned state troopers just forgot to use their audio-visual equipment. In any event, it was not used. The main negative inference is that the Court does not now have, before it, just how the second and third tests, i.e. the walk and turn test and the one leg stand test, really shook down. An audio-visual recording would also have added, as visual evidence, what the troopers both admitted, i.e. Hesnard "I saw nothing to indicate intoxication" (Tr. 114)

and Beckman, “I saw nothing, no faulty motor skills or any balance problems, or watery eyes, bloodshot eyes or heard any slurred speech or anything like that.” (Tr. 105).

X. LAW

The government responded to the Court’s request that the parties review the legal matters involved herein. The government first states that law enforcement officers are not required to videotape all traffic stops. No one has urged that all traffic stops must be videotaped. The Court points out the statement of the commanding officer of the Iowa Highway Patrol, all as set out in Exhibit 1010, made a part of this record. In that Exhibit, it is made clear that they have good equipment and that these audio-video tapes should be used and are used on a regular basis. The state troopers testifying in this case indicated that in almost every instance, they use the audio-video equipment.

As set out herein, the Court has commented on United States v. Chatman, 119 F.3d 1335, 1338 (8th Cir. 1997). In Chatman, the Eighth Circuit concluded that negative inferences from the absence of a video tape may be considered by the court as to the question of whether or not the government has met its burden of

proof, as here, on the issue of intoxication. The government cites United States v. Parker, 72 F.3d 1444, 1452 (10th Cir. 1995). The Parker court found that a law enforcement officer did not act in bad faith when he caused an erasure to a videotape which depicted an arrest and seizure of drugs and a weapon. In Parker, the court held that the failure to preserve the evidence was mere negligence.

In the case before this Court, we are not faced with a choice of bad faith or mere negligence as the Parker court was. Here, in Dickerson's case, it is a sufficient omission that allows this Court to conclude negative inferences when considering the totality of the circumstances to see whether a prudent person would believe Dickerson had committed the crime of intoxication, all as contemplated by U.S. v. Segars, as set out on page 5 of this Order. This Court has, for good reasons, drawn negative inferences from the failure to use the audio-video taping equipment.

X. OTHER ISSUES

This Court has not forgotten that Dickerson had a three-inch knife on him. Under Iowa law, a person is allowed to carry a knife of that size. Only a knife with a blade of five inches or

longer is considered a "dangerous weapon." Iowa Code § 702.7. This knife was not a factor in this situation because the knife was removed from Dickerson before the state troopers even arrived. There was no threatening situation as to the knife. But, there is little doubt that the law enforcement officers at the scene wanted to make certain that Dickerson was arrested. For all the reasons set out herein and because of the decision this Court has reached, it is not necessary to decide the defendant's claim as to the whether or not "the length and duration" of the detention "was such that it became a constitutional violation of the defendant's rights."

XI. SYNOPSIS

The Court refers back to page 11 of Magistrate Judge's Report and Recommendation as it relates to the bottom line question as set out below:

> Thus, Dickerson's motion boils down to whether Officer Queen had a right to arrest Dickerson as a result of the field sobriety tests. If so, then the evidence obtained incident and subsequent to the arrest was obtained properly. If not, then everything flowing from the arrest must be excluded.

The opinion testimony by Officer Queen, weakly supported by the officers, as set out in the Graphs, that Dickerson was

intoxicated by something other than alcohol can only be proved by solid credible evidence. It appears to the Court that Trooper Beckman wanted to give the impression that he did not want to interfere with officer Queen's actions and that he was just there to assist and that he felt that that did not give him authority to change anything.[3] He said that the officer who initiates the traffic stop is in charge unless he would say something about somebody else taking over this investigation. Trooper Hesnard also said whether or not Dickerson would be arrested was Officer Queen's determination. (Tr. 113). These statements, of no interference by the troopers, would apparently include not telling Officer Queen that they had audio-visual capabilities; not telling Officer Queen, that it would be a good idea to make the first test the Breathalyzer test, then, if the breath alcohol reading was not high enough, the audio-visual equipment would become all the more important to make the case standup in court when they are trying to show intoxication by drugs other then alcohol; and that Officer Queen should use a flashlight to better recognize the results of the "HGN" test.

[3] But again, remember what Trooper Beckman said about Officer Queen, all as set out on pages 30-31 of this Order.

As set out herein, Trooper Beckman acknowledged that within seconds of the time that Officer Queen said that he was going to arrest Dickerson, he and Trooper Hesnard took over, they searched the defendant, called the drug dog, put the defendant in Hesnard's car, took him to Storm Lake, jailed him, got the search warrant, conducted the search, all as set out on pages 26-31 of this Order. He also acknowledged that he had assisted the Buena Vista County Attorney in getting an affidavit and that he knew exactly where to go and what to do and that at that moment he was not waiting for Officer Queen to make any decisions as to anything.

Trooper Beckman had been in the police business for eight years. He was asked, based on that experience, to tell the Court whether or not, at times, when he was attempting to get a search warrant that he would want to make the very best record possible so that the matter would hold up in court. He said, "Yes", that was true, and that he, as a member of the Iowa State Patrol, was well aware that you had to promptly take the correct steps and in the right order to help make a case in court. He was then asked whether or not his group [the Iowa State Patrol]

want to, or are allowed to, present any half prepared situations to County Attorneys or Judges, matters that do not have solid backing to support the proposed charges. He said, "No, we are taught to recognize those problems and work to the best of our ability." All of the post-arrest procedures were competently carried out. The pre-arrest sobriety tests were not competently carried out. As the Magistrate Judge pointed out, the government has a burden of proof to meet. That burden has not been met.

XII. CONCLUSION

It is the finding of the Court that the evidence obtained by the sobriety tests, at the scene, prior to the arrest was not sufficient to carry the government's burden of proof. The less than credible testimony and the inconsistent conflicting observations of the officers, as to what they observed[4], or intentionally did not observe, together with the fact that the seasoned state troopers either decided not to use their audio-

[4] Trooper Hesnard made it very clear, "I watched none of the sobriety tests." He certainly gave the impression he did not watch on purpose. He made no excuse, such as, I was security, I was guarding the area. This conduct is just the opposite of what he was taught to do to make good cases. This too raises negative inferences.

video equipment to make a good record for a judge to consider, or “forgot” what they always do (turn on the equipment), thereby creating an absence of good, easy-to-follow evidence; tips the weight against the government. They have not met their burden of proof as to the sobriety tests. Everything flowing from the arrest must be excluded, including everything listed on Exhibits “H” and “I,” the inventories of the property seized.

The Court finds that the inconsistent, conflicting and less then credible evidence testimony as to the sobriety tests presented to this Court fails to persuade this Court that the arrest, based on some sort of intoxication (drug), was sufficient. In addition, as mentioned, the officers had a simple, sure way of showing the defendant’s condition, and they chose not to use this equipment. The Court draws negative inferences from the non-use of the audio-video equipment. The government has the burden. They have failed to meet it.

The Court finds that Officer Queen did not have a right to arrest Dickerson as a result of the field sobriety tests for either intoxication by alcohol or intoxication by a substance other than alcohol.

The defendant should have been released as he was no longer

a person who could be seized within the meaning of the fourth amendment. The Terry stop was over, completed. The investigative detention had been completed. See United States v. Jones 269 F.3d at 70 (set out on pages 3-4 of this Order).

IT IS THEREFORE HEREBY ORDERED that the Magistrate Judges Report and Recommendation is not adopted by this Court.

IT IS FURTHER HEREBY ORDERED that defendant's motion to suppress, (Docket No. 15), is hereby **sustained**. This Court finds that the evidence obtained incident and subsequent to the arrest was not obtained properly, and all evidence of any nature flowing from the arrest must be excluded and is hereby suppressed.

IT IS FURTHER HEREBY ORDERED that the press release concerning the audio-visual recording equipment, Exhibit 1010, is hereby admitted into evidence.

DATED this _____ day of August, 2002.

Donald E. O'Brien, Senior Judge
United States District Court
Northern District of Iowa